

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMERICAN CEMENT CORPORATION,

Appellant,

vs.

HEALY TIBBITTS CONSTRUCTION COMPANY,

Appellee.

APPELLEE'S ~~REPLY~~ BRIEF

FILED

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OVERTON, LYMAN & PRINCE
JEROME O. HUGHEY
550 South Flower Street
Suite 607
Los Angeles, California 90017

Attorneys for Appellee

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Appellee's Statement of the Case

Appellee's principal quarrel with the appellant's statement of the case is that most of the facts recited have nothing to do with the issue presented by this appeal. There were three parties involved in the action below. Appellant rented its barge to appellee. Appellant sold 3,600 tons of rock to appellee and agreed to load the rock on its barges at Catalina Island. Appellant loaded Barge No. 41 to its own satisfaction and then delivered the loaded barge to the Garvin Towboat & Barge Company. Garvin proceeded to tow the loaded barge from Catalina Island to the job site off the coast of California near San Diego. Enroute the barge took water and dumped a part of its load. The court found, contrary to the contentions of both the appellant and appellee, that none of the parties was negligent and that therefore each of them would have to bear its own losses. Not having ever had actual possession of either barge or cargo prior to the casualty, the appellee had contended below that the casualty was due either to the negligence of American Cement Corporation in furnishing an unseaworthy barge or its negligence in improperly loading the barge or alternately the negligence of Garvin in making the tow.

Appellant asserts that notwithstanding the foregoing the appellee must not only absorb its own losses but

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those suffered by the appellant.

American asserts that the opinion of the court below did not rule that Healy Tibbitts did not agree to return the barge in the same condition as when it was received. Healy Tibbitts claims the opinion does cover this point. This ruling was implicit in the court's refusal to accept American's contrary contention asserted in its pleadings and throughout the trial. At the short hearing held following the rendering of the opinion of the court, the "contract theory" of American was again advanced. The court responded that its opinion was written in contemplation of that point and that the court had rejected it. The court then signed findings specifically negating American's contention. See Finding No. 6.

Question Presented

The only question presented by appellant is whether Finding No. 6 is "clearly erroneous" within the meaning of F.R.C.P. 52(a).

F.R.C.P. 52(a) provides in part:

"findings of fact shall not be set aside unless clearly erroneous. . . ."

The judicial interpretation of "clearly erroneous" is set forth in U. S. v. U. S. Gypsum Co., 333 U.S. 364, 396; 92 L.Ed. 746, 766 (1948) as follows:

1 "A finding is 'clearly erroneous' when although
2 there is evidence to support it, the reviewing
3 court on the entire evidence is left with the
4 definite and firm conviction that a mistake has
5 been committed."

6
7 F.R.C.P. 52(a) requires the appellate court to take:
8 "due regard . . . [of] the opportunity of the
9 trial court to judge of the credibility of the
0 witnesses."

1
2 The oral testimony of the witnesses in this case was
3 directly contrary on the point in issue. Smith of Healy
4 Tibbitts testified that he did not agree in his contract with
5 American to return the barge in the same good order and condi-
6 tion as when it was received.¹ Dunn of American testified
7 to the contrary of Smith. Smith's testimony is corroborated
8 by the writing which embodied the agreement of the parties.
9 See Exhibit 2. Conspicuously absent from the written agree-
0 ment is any promise to return the barge in the same condition
1 as when received. Nor is it logical to infer that the
2 appellee had obligated itself to return the barge in the same
3 condition as it was prior to its being loaded by appellant
4 and prior to having been towed by Garvin.

5 ¹ See Page 88, Line 23 through Page 89, Line 2 of the
6 Transcript.



1 After hearing both Smith and Dunn, the court credited
2 the Smith oral testimony and accordingly made its Finding
3 No. 6.

4 Uniformly, the courts have upheld findings based on
5 one side of disputed and contradictory testimony. American
6 relies in this appeal on the criteria of review found in
7 Oliver J. Olson & Co. v. Luckenback S.S. Co., 279 F. 2d 662,
8 668 (9th Cir. 1960), to the effect that where the undisputed,
9 independent evidence is consistent only with one of the wit-
10 nesses, a finding will be upset if not in accordance with that
11 witness. American says the independent evidence is undisputed
12 and consistent only with Dunn's testimony and the finding,
13 based on Smith's testimony, therefore must be set aside.

14 In this brief Healy Tibbitts answers American. Healy
15 Tibbitts argues that by squaring the independent evidence
16 with the credited oral testimony of Smith, it is apparent that:

- 17 (1) The independent evidence is not inconsistent
18 with the credited oral testimony of Smith.
- 19 (2) The evidence itself is susceptible of varying
20 interpretations and supports conflicting infer-
21 ences. One set of the alternative inference
22 supports Smith; one set of inferences supports
23 American.
- 24 (3) The independent evidence was explained by Smith
25 in a manner making it consistent with the Smith
26 testimony; and



1 (4) On balance the independent evidence more force-
2 fully supports Smith than Dunn.

3
4 The independent evidence is certainly not
5 "so inconsistent with the oral testimony which the
6 trial court has credited [that the appellate court]
7 ought to override findings of fact based on such
8 oral testimony"

9 within the meaning of Oliver J. Olson & Co. v. Luckenback
0 S.S. Co., 279 F. 2d 662, 669 (9th Cir. 1960).

1 The question then is what independent evidence bears
2 on whether or not Healy Tibbitts agreed to return the barge
3 in the same good order and condition as when it was received.

4 First, there is the actual written contract of the
5 parties. See Exhibit 2. It is a purchase order issued by
6 Smith of Healy Tibbitts and accepted by Dunn of American.
7 The court found it to be a bareboat charter, see Findings
8 Nos. 6 and 13. Smith testified that the purchase order
9 represented the complete agreement of the parties.

10
11 The Contract

12 Transcript Page 64, Lines 18-24:

13 "Q Now, did the purchase order that you issued
14 reflect the deal as you understood it to be?

15 A Yes.

16 Q And the purchase order which you issued, was

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1 this so far as you were concerned the contract that you
2 had with American?

3 A Yes."

4
5 Transcript Page 84, Line 15 through Page 85, Line 7:

6 "Q Now would you refer to Exhibit 2? Now what is
7 that document, Mr. Smith?

8 A That is our purchase order to Riverside
9 Cement Company.

10 Q And is that the purchase order that you were
11 referring to when you testified that a purchase order
12 reflected the deal between American Cement and Healy
13 Tibbitts?

14 A It is.

15 Q And that was supposed to represent the contract?

16 A Yes.

17 Q Does it represent all of the agreement between
18 yourself, for Healy Tibbitts, and Mr. Dunn for American
19 Cement?

20 A For this Barge?

21 Q Yes.

22 A For 41?

23 Q Yes.

24 A Yes."

25
26 Transcript Page 86, Lines 4-7:

"Q Were there other agreements between you and Mr. Dunn that were not included on your Healy Tibbitts purchase order?

A Not to my knowledge, no. "

It is obvious that the written agreement is not inconsistent with Smith's oral testimony to the effect that Healy Tibbitts did not agree to return the barge in the same condition as when received. There is no such promise in the written agreement.

Second, American points to the matter of insurance. Since Smith obtained insurance for a period which turned out to be inclusive of the dates of the charter, American argues that Healy Tibbitts must have considered itself to have full risk of the barge and to be under a contractual obligation to return the barge in the same condition as when received. Indeed, Smith did arrange for insurance. But that was on his own initiative as a matter of business prudence. It was not inspired by the contract terms but by the risks Smith considered existent when Healy Tibbitts took physical custody of the barge at the job site. This is consistent with the fact Smith considered the deal an F.O.B. job site proposition since Garvin, a third party, had possession of the barge when it was in tow between Catalina and the job site.

American did not bargain for the benefit of the Healy Tibbitts insurance coverage. It neither asked for it nor did

1 it pay for it. The terms and conditions of the agreement
2 between American and Healy Tibbitts are set forth in the pur-
3 chase order, Exhibit 2.

5 Transcript Page 87, Line 19 through Page 88, Line 11:

3 "Q Now, my question was, what was there about the
7 transactions or the purchase order that changed the
3 care and custody to Healy Tibbitts at the site?

3 A Well, our tugboat -- the small tugboat down
0 there took it over and dispatched Garvin, yes.

1 Q The change, the change in the tugboat at the site?

2 A Well, the point is that I never saw this as
3 anything but an F.O.B. proposition. So I assumed that
4 we took responsibility upon delivery. Now, whether
5 we paid 10 cents a ton or how we did it, it was still,
3 in my thinking, an F.O.B. proposition.

7 Q F.O.B. where?

3 A Jobsite.

3 Q Your understanding was that it was to be F.O.B.
0 jobsite?

1 A The mechanics of how they were paid didn't
2 enter into it. In my thinking, this was an F.O.B.
3 jobsite delivery, so we took custody upon delivery
4 on the jobsite."

3 During this period Healy Tibbitts did not have a

1 general liability policy, so Smith obtained insurance to cover
2 any risks he might have when the barge was under the control
3 of his employees at the job site.
4

5 Transcript Page 67, Line 22 through Page 68, Line 25:

6 "BY MR. HUGHEY:

7 Q At the time that you constructed these fish
8 mounds, did Healy Tibbitts have a general liability
9 policy or a policy of insurance which would cover its
0 employees for their negligence in using other people's
1 equipment?

2 A Not to my knowledge, no.

3 Q And did you, therefore, have a practice of taking
4 out insurance from time to time as to your custody of
5 other people's equipment?

6 A We had had some bad experience and we were
7 negotiating with several brokers at the time for a
8 blanket coverage, but at the time we didn't have it,
9 so we were spot insuring our jobs.

0 Q You say you had some bad experience. What do
1 you mean by that?

2 A Well, cases where the tower was liable, it
3 didn't cover the damage to the barge.

4 Q And was this a precautionary effect? Well,
5 did you take insurance in connection with Barge 41?

6 A Yes.

1 Q And what was the premium on that?

2 A It was very small. If I am not mistaken, it
3 was \$100 for each barge, a total of \$200, something
4 like that.

5 Q Now, did you regard this as a business prudence
6 measure or a precautionary measure, is this why you
7 took it, or did you have some other reasons for
8 getting this policy?

9 A Yes, I would say it was prudence. Certainly
0 there came a time when we would take custody on the
1 site and we had to be covered at that point."

2
3 Transcript Page 119, Lines 1-8:

4 "Q When you obtained the insurance for Barge 41,
5 were you insuring against perils of the sea and the
6 negligence of your employees when the barge was at the
7 jobsite after transit?

8 A Yes, that was my intention."

9
0 Transcript Page 86, Line 23 through Page 87, Line 7:

1 "Q Did you and Mr. Dunn agree that American
2 Cement would put Healy Tibbitts on its coverage so
3 that there would be a coverage in favor of Healy
4 Tibbitts above \$25,000?

5 A Yes.

6 Q Now, why was that done, if Healy Tibbitts was not

1 taking the risk of loss and damage?

2 A So that we had coverage on the site."

3
4 Transcript Page 88, Line 23 through Page 89, Line 2:

5 "Q All right, so in following your reasoning,
6 Healy Tibbitts took the responsibility for the barges
7 and all risk of loss and damage at Catalina when the
8 rock was placed on board the barges, isn't that
9 correct?

0 A No. Not in my mind."

1
2 Transcript Page 91, Line 21 through Page 92, Line 5:

3 "Q . . . Mr. Dunn told you that you could charter
4 or use 41 and 42 at a fixed price per ton?

5 A Yes.

6 Q And that you, Healy Tibbitts was to accept,
7 take the risk of any damage or loss to the barges while
8 Healy Tibbitts had the use of the barges?

9 A No. Mr. Dunn never mentioned any loss on the
0 barges. I don't think it entered his mind."

1
2 Transcript Page 92, Lines 6-9:

3 "Q Well, didn't you discuss insurance"

4 A Yes. I initiated the discussion of insurance,
5 as I have said, because I wanted to know what would
6 happen on the site, to be protected." [Emphasis added.]

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2 "Q And was not the insurance that was obtained
3 covering the barges through that entire period, from
4 the time that they were picked up by Garvin's tugboat
5 until they were taken over to Catalina and loaded,
6 until it went down to Imperial Beach and until the
7 barges returned to Long Beach and were redelivered to
8 American Cement Company?

9 A Yes. It was based upon one month's coverage.

0 Q And there was no restriction on the insurance
1 coverage, that the insurance only attached while the
2 barges were at the jobsite, was there?

3 A It made no difference in the premium."
4

5 Transcript Page 93, Line 20 to Page 94, Line 24:

6 "Q Now, Mr. Smith, when you issued instructions to
7 obtain insurance coverage on Barge 41, to whom did
8 you issue those instructions?

9 A I believe it was Mr. Morrill with -- I can't
0 remember the name of the firm.

1 Q And did you talk with Mr. Morrill?

2 A Yes.

3 Q And did you describe the nature of the risk?

4 A Yes, I believe I did.

5 THE COURT: A little louder. I couldn't hear
6 you.

7 A Yes, sir.

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1 BY MR. BRADLEY:

2 Q And what did you tell him?

3 A The best I could I described the job and what
4 the conditions were at the site, how far we were from
5 San Diego Harbor and what might happen.

6 Q Did you tell him anything about the tow?

7 A Perhaps. I don't recall. I can't recall.

8 Q Well, you did tell him that the barge was going
9 from Long Beach to Catalina and then down to Imperial
0 Beach, didn't you?

1 A Yes, I did.

2 Q And you asked him to obtain coverage for that
3 trip, didn't you?

4 A Yes. I believe the intent was that the barge
5 be covered for a certain period --

6 Q Which would encompass the trip?

7 A Well, as it turned out, it did. But as I recall,
8 the only thing that I was concerned about was the barge
9 at the jobsite." [Emphasis added.]

0
1 Transcript Page 101, Lines 12-15:

2 "A . . . earlier I explained I didn't expect to
3 be held liable for the barge in transit; I expected to
4 be held liable for it when it was delivered. . . ."

5
6 Transcript Page 107, Lines 4-12:

"Q And did you not advise your underwriters that Healy Tibbitts, during this period while it was using Barge 41 from Long Beach to Catalina to carry the load down to Imperial Beach to unload the rock and back to Long Beach was acting in effect as the owner of the barge with all of the responsibilities --

A No.

Q -- risk of loss and damage?

A No."

The transaction as originally conceived contemplated American towing the barge to the jobsite where Healy Tibbitts would take delivery.² American was going to hire Garvin Towboat for the tow and then bill Healy Tibbitts. However, because American intended to charge demurrage, the deal as finally arranged was that the cargo of rock was purchased F.O.B. Catalina. The only thing changed though, in Smith's mind, aside from eliminating demurrage, was that Garvin would bill Healy Tibbitts direct. Healy Tibbitts would still not get the barge until it came to the jobsite. During the tow Garvin would still have the possession of the barge. It was for this reason that Smith, when he issued Exhibit 2 which read "ship via . . . F.O.B. Catalina", considered delivery would be the same as before, namely at the job site and Healy

² Transcript Page 19, Lines 8-20.

1 Tibbitts would need insurance when the barge was delivered
2 at the job site.

3 Smith did not obtain insurance as part of an agreement
4 to return the barge in the same good order as when received.
5 He obtained insurance as a matter of business prudence to
6 insure against the negligence of his employees when they had
7 exclusive custody of the barge at the job site. The insurance
8 of Healy Tibbitts was for a period since it was unknown just
9 when and how long the barge would be at the job site and there
0 was no difference in the premium. All of this is entirely
1 consistent with Finding No. 6.

2 Third, after the casualty the underwriters arranged
3 for a survey, which is the common practice. Never has attend-
4 ance at a survey by an underwriter's representative been
5 deemed an admission of the liability of the underwriter's
6 assured. The practice is for all parties to be present at a
7 survey³ and the reason is to determine the damages, not the
8 liability. Attendance at the survey is not inconsistent with
9 Finding No. 6.

0 Fourth, bids were addressed to Healy Tibbitts and the
1 bill for repairs was sent to Healy Tibbitts. However, Healy

2
3 ³ American's underwriter also had a representative present at the
4 survey. American's Brief Page 4, Line 21, last paragraph;
5 American's Libel Page 4, Lines 29-30; Transcript Pages 52-53;
6 Transcript Pages 29-30.

1 Tibbitts had nothing to do with obtaining bids, effecting the
2 repairs, or paying the bill. It is just as easy to argue that
3 since American authorized the repairs and paid the bill⁴,
4 that it considered itself liable for the damage.

5 Smith testified in this respect:

6 Transcript Page 118, Line 2 through Page 119, Line 8:

7 Q Mr. Smith, when you were cross examined by Mr.
8 Bradley, he showed you some bids that were addressed
9 to Healy Tibbitts. Did you initiate those bids?

0 A I did not.

1 Q All right. Do you know who initiated those
2 bids?

3 A I believe the U. S. Salvage did through Mr.
4 Morrill's instructions.

5 Q Now, when you received these bids, did you do
6 anything with respect to them, I mean did you accept
7 any of them or did you reject any of them or did you
8 do anything with respect to any of those bids?

9 A No. I believe Mr. Kornegay opened the bids,
0 read them and put them in a brief case and walked off
1 with them.

2 Q The people that did the repair work, did they
3 ever deal directly with you in arranging for the repair
4 of the barge?

5
6 ⁴ Transcript Pages 30-31; Exhibit 5.



1 A Not to my knowledge

2 Q Well, they didn't call you and say, 'Shall we
3 go ahead with it,' did they?

4 A No, Sir.

5 Q Otherwise, in effect you had nothing to do with
6 these bids, did you?

7 A That is correct, nothing to do with them."

8
9 Fifth, after the casualty Healy Tibbitts's purchase
0 order was modified to read F.O.B. job site. However, that was
1 done since Dunn insisted to Smith that under the present
2 arrangement Smith was liable for the barge damage. Smith
3 wanted to continue with the job and not argue at that point
4 over responsibility for the casualty. Smith testified as
5 follows:

6 Transcript Page 101, Lines 24-25:

7 "Since there was no extra cost either way, there
8 was no harm in doing it that way, and it certainly
9 saved arguments."

0
1 Transcript Page 100, Lines 23-24:

2 "At the moment my interest was to finish the
3 job and not argue with anybody about damages to
4 barges."

5 So the purchase order was changed. But even as changed, it
6 does not contain the alleged promise to return the barge in the

1 same good order and condition as when received. See Exhibit
2 14. Certainly, if American expected that as a term, it would
3 have inserted it in the modified agreement. Changing the
4 written contract insofar as place of delivery is concerned,
5 gives rise to no rule of construction imparting to the un-
6 changed agreement the alleged promise. Both the original and
7 the modified agreement are consistent with Finding No. 6.

8 In short, all the independent evidence, especially
9 the written contract of the parties, is consistent with Smith's
0 testimony and Finding No. 6, which therefore must be upheld.

1 However, even if Healy Tibbitts had promised to
2 return the barge in the same good order and condition as when
3 received, this would not enlarge Healy Tibbitts's liability
4 as a charterer. Healy Tibbitts would still only be liable
5 for negligence. There can be no doubt Healy Tibbitts was not
6 negligent. See Finding No. 13.

7 Mulvaney v. King Paint Mfg. Co., 256 F. 612 (2nd Cir.
8 1919);

9 Chase v. Morrell, 25 F. Supp. 904 (S.D.N.Y. 1938);

0 J. M. Brown, Inc. v. W. P. Fuller & Co., 28 C.A.
1 676 (1915);

2 Reconstruction Finance Corp. v. Peterson Bros.,
3 160 F. 2d 124 (5th Cir. 1947);

4 Harrison Brothers Drydock & Repair Yard, Inc. v.
5 Atkins, 193 F. Supp. 386 (S.D. Ala. 1961);

6 Venice v. Frazier Davis Const. Co., 87 F. Supp. 475

Healy Tibbitts places heavy reliance on the Mulvaney v. King Paint Mfg. Co., case where it was specifically held that a promise to return an item in the same condition as when received did not enlarge the liability of the promisor beyond the normal liability for damages due to negligence.

In Warren & Arthur Smadbeck v. Heling Contracting Corp., 50 F. 2d 99 (2nd Cir. 1931), a charter party case, the court stated:

"There is some evidence in the record that the parties discussed the insurance on the dredge, and, although contradicted by the appellee's witness, it was testified that the appellee agreed to insure the vessel against fire loss." At 101.

Respecting this point the court held:

"There is no clause in the charter which holds the charterer liable as an insurer against fire, and no provision should be read into it reaching that result unless it be stated clearly and in unambiguous language. Whenever a charterer has been held responsible, it has appeared that he has promised to return the barge in the same condition as received with the usual wear and tear expected and has failed to show that his care of the vessel excuses him. . . ."

At 100.

Under this line of cases American could not recover even if Finding No. 6 were set aside.

Conclusion

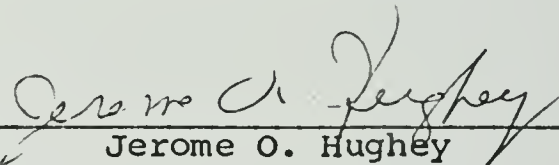
The law is consistent with the court's opinion and findings. A charterer is not absolutely liable for damage to the chartered vessel but is only liable for negligence. Here there was no negligence proven and there was no promise in the charter upon which Healy Tibbitts could be found liable. Finding No. 6 was based on conflicting oral testimony. It is supported by the written contract. The independent evidence is consistent with the credited oral testimony of Mr. Smith. The finding is not "clearly erroneous". The judgment should be affirmed.

Dated: October 18, 1966.

Respectfully submitted,

OVERTON, LYMAN & PRINCE

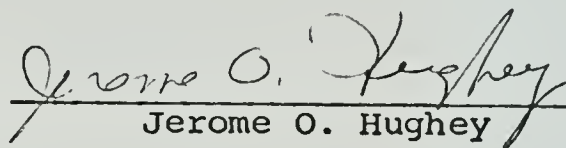
By



Jerome O. Hughey
Attorneys for Appellee

CERTIFICATE

I certify that in connection with the preparation of this brief I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.


Jerome O. Hughey

